

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBIN AND SUSAN BENSKIN, individually,
and ROBIN BENSKIN, as the Personal
Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE
GOODFELLOW and ROBERTA EVANS,
Appellants,

v.

CITY OF FIFE and JONG KIM and “JANE
DOE” KIM and the Marital Community
Composed Thereof,
Respondents.

No. 37401-3-II

UNPUBLISHED OPINION

Van Deren, C.J. — Robin and Susan Benskin, individually, and Robin Benskin, as the personal representative for the estate of Heather Benskin, Josh Mihok, Tina Marie Goodfellow, and Roberta Evans,¹ appeal the trial court’s summary judgment in favor of the City of Fife, Fife Municipal Court, and Fife Probation Department² based on the trial court’s determination that the Benskins cannot show that the City’s failure to supervise probationer Jong Kim proximately

¹ For clarity we refer to the plaintiffs collectively as the Benskins.

² We refer to the defendants collectively as the City.

caused the accidents that resulted in their damages. The Benskins argue that issues of material fact preclude summary judgment on their negligent supervision action. We reverse and remand for further proceedings.

FACTS³

I. Kim's Probation

"Kim ha[s] a long history of alcohol-related driving violations and alcohol abuse." Clerk's Papers (CP) at 826. The 2002 driving under the influence (DUI) conviction that is the basis of this action was Kim's fifth DUI conviction since 1991. Three years previously, in 1999, the Department of Licensing revoked Kim's license for seven years, declaring that he was a "habitual offender" under RCW 46.65.070.⁴

The trial court sentenced Kim to 365 days in custody but suspended 155 days of the sentence on the 2002 DUI. During the 210 days of the sentence that were not suspended, Kim was to serve 90 days in jail or at Progress House, a work release facility, and be on electronic home monitoring for 120 days. The trial court also ordered Kim to pay \$2,275 within 60 days. Based on this conviction, the court suspended Kim's license for three years.⁵

The court also ordered Kim to (1) "not drive without valid license and insurance," (2)

³ The facts of this case are set out in our earlier decision reversing the first summary judgment order in favor of the City. *Benskin v. City of Fife*, noted at 130 Wn. App. 1003, 2005 WL 2651403, at *1-3. For purposes of this appeal, we recite only those facts relevant to the issue of whether the plaintiffs have raised issues of material fact on the issue of proximate cause sufficient to avoid summary judgment.

⁴ "No license to operate motor vehicles in Washington shall be issued to an habitual offender . . . for a period of seven years from the date of the license revocation except as provided in RCW 46.65.080." RCW 46.65.070(1).

⁵ It is not clear from the record whether Kim's license had been reinstated before this suspension.

“[h]ave law abiding behavior” and “no similar incidents,” (3) not take “mood altering substances without a prescription,” (4) “[h]ave no alcohol/drug related offenses or non-prescription drugs,” (5) “[h]ave no criminal traffic convictions,” (6) not drive a motor vehicle if a blood or breath test “would result in a positive reading of alcohol or drugs w[ith]in 4 hours of driving,” and (7) “NOT refuse to submit” to a breath or blood test for alcohol. Kim was also directed to “[f]ile monthly status reports (treatment)” and to file with the court proof that his vehicle had an ignition interlock device if he was issued a valid driver’s license. Lastly, he was ordered, “You must report to the Fife municipal court probation within five (5) working days to monitor compliance.” CP at 218 (emphasis omitted). The court retained jurisdiction over Kim for 60 months.

Kim entered Progress House on August, 12, 2002, and was released on October 21, 2002. The probation department had little contact with Kim following his conviction; its only full time probation officer spoke with Kim once on the telephone. On January 13, 2003, she requested that the court conduct a probation review hearing because Kim had not complied with the conditions of his suspended sentence. She stated, “Mr. Kim has failed to provide proof of treatment and has not had direct contact with the probation department and failed to appear for a scheduled . . . appointment.” CP at 307.

Her request for court action noted:

Based on the defendant’s high risk to the community and lack of follow through with court ordered probation the following is recommended:

1. Mr. Kim [will] provide proof of treatment within 30 days or serve the remainder of his sentence in jail.
2. Mr. Kim will provide proof of 5 sober support meetings per day [sic] until actively in treatment.
3. Mr. Kim will remain on Formal probation until his case is closed and pay any additional cost.

CP at 307.

Kim did not appear for a review hearing set on February 12, 2003, because the probation department had not sent notice of the hearing to Kim or his counsel. As a result, the court rescheduled the review hearing for March 12, a month later.

II. Fatal Collision

On March 9, 2003, three days before the rescheduled hearing, at approximately 1:49 am, Kim drove his pickup truck the wrong way on the state route 16 on ramp from Interstate 5 and struck head-on the vehicle Josh Mihok was driving. Twenty-four year old Heather Benskin, a passenger in Mihok's vehicle, died of injuries sustained in the crash.

Just before striking Mihok's vehicle, Kim was involved in two other collisions on state route 16. A witness, Gordon Bechtel, saw Kim's vehicle speeding on the westbound highway. He heard a loud noise and saw Kim's truck spin across the road toward the left side and collide with Tina Marie Goodfellow's vehicle. Kim's truck eventually came to a stop facing eastbound in the westbound lanes.

Roberta Evans was driving westbound on state route 16. After witnessing Kim's first collision, she pulled her vehicle to the left shoulder. Kim's truck started forward and struck her vehicle so hard that the airbag deployed. Kim exited his truck and asked Evans if she was all right. Evans told Kim that she was not but Kim returned to his truck and drove away, still traveling eastbound in the westbound lanes.

Kim's truck then struck Mihok's vehicle. After the collision, Kim left the scene on foot. A witness, who saw Kim exit his car and flee the scene, opined that Kim was in a "drunken

stupor” at the time. CP at 828 (citation omitted). Kim left his cellular telephone in his truck.

Kim contacted the police approximately 31 hours after the collisions.

III. Lawsuit

On October 3, 2003, the Benskins sued Kim and the City. The Benskins asserted that the probation department breached its duty to supervise Kim while he was on probation for his July 30, 2002, DUI conviction, proximately causing their various losses.

The City first successfully moved for summary judgment on November 30, 2003, based on its argument that the municipal court order imposing Kim’s probation created no duty and that the probation department had judicial immunity because it was acting as an arm of the court. We reversed both grounds for summary judgment, holding that (1) the facts indicated a “take-charge” supervisory relationship establishing the City’s duty in this situation and (2) “the City’s probation department is not immune from suit based on judicial immunity at common law or ARLJ 11.” CP at 825.

IV. Remand

The City next succeeded on motions for summary judgment on the issue of causation. In support of its motions, the City submitted the declarations and depositions of Kim and an expert witness, arguing that the Benskins could not show that the City proximately caused the several accidents that resulted in damages to plaintiffs. The Benskins opposed the City’s motions and submitted numerous declarations and depositions in response.

The Benskins moved for reconsideration of the order granting summary judgment to the City and the City responded. The Benskins included the declaration of an additional expert in

their reply. The trial court considered this new expert's declaration but denied the Benskins' motion for reconsideration.

The Benskins appeal.

ANALYSIS

I. Standard of Review

When reviewing a summary judgment order, we make the same inquiries as a trial court. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). We consider all the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We consider all legal questions de novo. *Cowlitz Stud Co.*, 157 Wn.2d at 573. Summary judgment is appropriate if “there is no genuine issue as to any material fact” and the moving party shows that he or she is “entitled to a judgment as a matter of law.” CR 56(c). “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co.*, 164 Wn.2d at 552.

“The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law.” Consequently, “[t]he nonmoving party avoids summary judgment when it ‘set[s] forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.’” *Ranger Ins. Co.*, 164 Wn.2d at 552 (alteration in original) (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). “[T]he nonmoving party ‘may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.’” *Ranger Ins. Co.*, 164 Wn.2d at 552 (some

No. 37401-3-II

alterations in original) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

II. Material Issue of Fact on Causation

To prove negligence, a plaintiff must prove the existence of a duty to the plaintiff, breach of that duty, a resulting injury to the plaintiff, and proximate cause. “If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper.” *Ranger Ins. Co.*, 164 Wn.2d at 552-53.

The Benskins argue that the City proximately caused their injuries by failing to properly supervise Kim. The City contends that the Benskins cannot raise an issue of material fact about proximate cause because nothing in the record demonstrates with any degree of certainty that Kim would have been in jail or would not have reoffended on the date of the accident. But neither the facts nor the case law support the City’s arguments in this case.

In our earlier opinion, we held that the City had a “duty to protect the public from foreseeable behavior associated with the conditions of the [sentencing] order,” namely, that Kim “provide proof of treatment and, essentially, refrain from driving.” CP at 832. In discussing the City’s duty and its breach of that duty that proximately caused their injuries and damages, the Benskins assert that the City’s take-charge supervisory duty included taking proactive steps to contact Kim’s family, employer, or treatment provider—the “collateral contacts”—either by telephone or in person to determine whether Kim was following the suspended sentence conditions. CP at 1926.

According to William Stough, a former community corrections officer (CCO) and probation supervision expert, it is “standard operating procedure in any probation department to make collateral contacts to verify whether the offender is in compliance with the conditions that

were set down by the court or the parole board.” CP at 1875. For example, he notes with approval that the Pierce County probation department had regular contact with Kim’s treatment provider when Kim was on probation there. Stough opined that Fife’s probation officer should have contacted and interviewed Kim’s wife. Even the City’s expert, Dr. Travis Pratt, director of Washington State University’s criminal justice program and an expert in how threat based sanctions affect criminal behavior, admitted that closer supervision would have increased the chances of catching Kim’s probation violations.

The Benskins’ experts assert that Kim, in particular, warranted closer supervision because of his extensive criminal history. Dr. William George, a University of Washington psychology professor who specializes in alcohol dependence and antisocial behaviors, concluded “[t]hat it was immensely foreseeable that without close and competent probation monitoring Kim would again drink and drive and endanger the lives of those in the community, as what did happen on March 9, 2003.” CP at 1962. Dr. Robert Keppel, a criminal justice professor at Sam Houston State University and professional serial offender profiler, testified that “[o]ut of the hundreds of DUI cases that I have investigated . . . Kim had the worst history of drunk driving and dangerous driving behaviors that I have ever reviewed.” CP at 1190. Stough echoed this sentiment and Kim’s sentencing judge said that Kim “ha[d] the worst criminal history for driving while under the influence” that he had ever encountered. CP at 124. Even the City’s probation officer acknowledged that Kim was “high risk.” CP at 312.

The Benskins also assert that the City’s failure to provide Kim notice of the violation hearing fell below the standard of care that is within the scope of the City’s “duty to protect the

No. 37401-3-II

public from foreseeable behavior associated with the conditions of the [sentencing] order.” CP at 832. The City’s probation officer denied responsibility for notifying probationers of upcoming hearings and could not articulate how the department gave notice. The court administrator also denied responsibility for giving notice of probation violation hearings. The municipal trial judge, who also was the head of the probation department and its only other member, stated:

The process calls for the probation officer to make this request [to set a probation review hearing] and I forward it to the court clerk. The clerk then generates the Notice of Case Setting. The notice is supposed to be mailed to Mr. Kim and his lawyer. My staff did not mail the notice.

CP at 3085.

In addressing proximate cause, we now assume, without deciding, that the City breached its duty to supervise Kim. Moreover, the trial court rejected the City’s argument that the municipal court’s ruling to continue the review hearing broke the causal chain. Because the City elected not to appeal that decision, raise the issue before a subsequent trial court, or cross appeal it in this action, the City is precluded from arguing intervening cause on appeal by the law of the case.

“Proximate causation includes both cause in fact and legal causation.” *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999). “To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff.” *Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). In most cases, cause in fact is a jury question. *Joyce*, 155 Wn.2d at 322.

“Legal causation involves a determination of whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant’s act should go.” *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008). “Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury ‘are so highly extraordinary or improbable as to be wholly beyond the range of expectability.’” *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)).

The Benskins first argue that, but for the City’s failure to supervise Kim, he would not have reoffended by drinking and driving on March 9, 2003, because he had responded well to his past probation supervision. George stated that a causal relationship existed between Kim’s earlier, competent probation monitoring and a significant reduction in his risk to the community. He explained this relationship accordingly:

If Kim is held accountable by competent monitoring services – which require;
. . . an ongoing determination about whether [he] is in compliance with court
ordered regulations concerning alcohol consumption, treatment attendance and
compliance, and driving and
. . . [if the supervision] require[s] known contingent negative sanctions (such as
probation revocation [thus incarceration]) for noncompliance, and,
. . . then Kim attends treatment and maintains sobriety,
. . . then – in turn – he exhibits little or no incidence of drunk driving, and,
. . . as a consequence – his actual risk of harm to the community is minimized.

CP at 1958 (some alterations in original).

In addition, Dr. Robert Crutchfield, a University of Washington professor who studies criminal recidivism and probation supervision, concluded that “Kim’s recidivism and re-offense

... is directly linked to the lack of and poor probation supervision ... that occurred here.” CP at 3256. Daniel Hall, a corrections expert,⁶ concurred that the City’s lack of supervision was the proximate cause of these accidents. Stough argued that close supervision reduces criminal recidivism. Crutchfield also opined that, “on a more probable than not basis, the scientific evidence ... demonstrates that adequate and proper parole/probation supervision has been shown by research to significantly reduce recidivism and increase desistance from criminal behavior when supervision is adequate and when it is linked to appropriate treatments.” CP at 3256.

Contrary to these experts’ testimony, the City relied on Pratt’s opinion:

It is the consensus of the scientific community that additional probation or intense supervised probation is not established as an effective deterrent for reducing criminal recidivism. Accordingly, the claims advanced by Mr. Hall and Mr. Stough cannot be supported by reference to peer reviewed archival or scientific publications. In fact, the peer reviewed and scientific publications show the exact opposite of the claims that they are making.

CP at 26. In his view, the only effect of closer supervision would be an increased chance of catching any of Kim’s existing probation violations. Pratt also found fault with the opinions of Crutchfield and George:

[Crutchfield and George] both point to periods where Mr. Kim was under supervision and was not arrested often. They suggest that this proves that probation was effective.

But this is an overstatement of a weak correlation, and it does not prove causation. There is no proof that Mr. Kim was engaged in law-abiding pro-social behavior during these periods, only that he was not caught. And both ignore the longer periods between 1999 and 2001 when Mr. Kim was under no supervision and was not arrested, charged or convicted of any crime, and did not have any reported accidents or traffic infractions.

⁶ Hall worked for the Department of Corrections (DOC) for nearly 30 years as a probation and parole officer, CCO, and field office supervisor. He also worked as a drug and alcohol counselor with municipal and district court probation departments.

CP at 3266.

The City argues that the Benskins cannot point to evidence that closer supervision would have prevented the accident, relying heavily on *Hungerford v. Department of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006). In *Hungerford*, the Department of Corrections (DOC) supervised Cecil Davis following his release from prison. 135 Wn. App. at 245. In March 1990, Davis was convicted of second degree assault with a deadly weapon and first degree criminal trespass for attacking a Tacoma couple. The trial court sentenced him to serve 26 months in prison, spend one year in community placement, and pay fines, costs, and restitution, also called legal financial obligations (LFOs). *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 559, 54 P.3d 197 (2002). He served his sentence and completed probation but did not pay his LFOs. Then, in December 1992, Davis pleaded guilty to third degree theft; the trial court sentenced him to one year in jail but suspended this punishment so long as Davis successfully completed two years of probation and paid his LFOs. *Hungerford*, 135 Wn. App. at 247.

In February 1995, DOC informed the trial court that Davis was behind on paying his 1992 LFOs. *Hungerford*, 135 Wn. App. at 248. When he failed to attend a scheduled hearing, the trial court issued a bench warrant and police arrested Davis in early June. *Hungerford*, 135 Wn. App. at 248. At the June 5, 1995, bench warrant hearing, instead of ordering jail time, the trial court found his “failure to pay was not willful,” reduced the level of supervision by DOC from active status to only LFO monitoring, and ordered a review hearing of his LFO payments on December 8, 1995. *Hungerford*, 135 Wn. App. at 248.

Davis did not appear for the December 8, 1995, review hearing and the trial court issued a

bench warrant. On February 13, 1996, the trial court issued a second bench warrant for failure to pay LFOs arising from a 1990 felony. Davis murdered Hungerford-Trapp on April 14, 1996, before either warrant was served. *Hungerford*, 135 Wn. App. at 248.

In the ensuing civil suit, Hungerford-Trapp's family claimed that DOC's failure to supervise Davis led to her murder.⁷ Our court characterized this argument as whether "Davis would have been rehabilitated," arguably because the plaintiffs relied solely on their expert's opinion that DOC's lack of supervision directly caused Davis to reoffend, which we determined was not based on studies or demonstrable facts. *Hungerford*, 135 Wn. App. at 255. We instead labeled the expert's assertion as vague, "without any source material to support it," based on merely correlative evidence, and "speculative at best." *Hungerford*, 135 Wn. App. at 255.

Here, the Benskins successfully distinguish the plaintiff's argument in *Hungerford* from their argument that, under proper supervision, Kim would not have reoffended and caused these accidents. Evidence that suitable, ordered supervision would have prevented the harm is much stronger here because Kim's particular history demonstrated that he did not reoffend when properly monitored. *See Hungerford*, 135 Wn. App. at 247-48. This individualized evidence is the causal relationship that we found lacking in *Hungerford*. *See* 135 Wn. App. at 255. In *Hungerford*, unlike here, DOC's active supervision, i.e., its take-charge relationship, of Davis ended on June 5, 1995, when the trial court reduced the level of his supervision to only LFO

⁷ The plaintiff alternatively claimed that "DOC's failure to report the probation violation caused [Hungerford-Trapp's] death," because Davis would have been incarcerated at the time, but we held that the trial court's ruling reducing the level of supervision and refusing to incarcerate him broke the causal chain that could connect DOC's actions with her murder. *Hungerford*, 135 Wn. App. at 251. "DOC owes a duty to those who are injured during an offender's active supervision, not after it ends." *Hungerford*, 135 Wn. App. at 258.

monitoring—10 months before the murder. 135 Wn. App. at 246.

Although the City argues that only their expert’s opinion captured the consensus of the scientific community and other expert opinions amounted to unscientific, correlative speculation,⁸ these arguments merely go to weight and credibility issues. The Benskins’ experts identified a causal relationship and pointed to both scientific literature and facts relating to Kim to support their testimony. Clearly, the experts disagreed on the value and efficacy of probation in general but, here, importantly, specific testimony explained adequate probation supervision’s dampening effect on Kim’s dangerous behaviors. This disagreement among experts is clearly a material issue of fact for the fact finder to resolve after hearing all of the evidence.

The Benskins also argue that, but for the probation officer’s failure to supervise Kim, she would have “discovered numerous egregious probation violations” and thus ordered an earlier hearing to review Kim’s probation. At this hearing they argue, the trial court “would have revoked Kim’s suspended sentence” and placed him in jail long past the time he caused these accidents. Br. of Appellants at 28. The Benskins also note that the City’s failure to send Kim notice of the originally scheduled review hearing absolutely precluded his incarceration before the date of the rescheduled hearing. The City claims that the Benskins must demonstrate that Kim would have been behind bars. We disagree.

The record supports the Benskins’ assertion that Kim routinely violated his probation conditions. Although Kim claimed that he was sober from his October 2002 release until the

⁸ Among the many criticisms leveled at the plaintiffs’ experts, the City argues that Pratt is “the only bona fide criminologist to address this area of science,” opinions by Crutchfield and George are merely correlative, and Hall and Stough base their conclusions only on an “under-graduate style textbook.” Br. of Resp’t at 9; CP at 26.

No. 37401-3-II

accident, George noted that Kim was in significant denial of his alcohol dependence. Kim's wife, Min Kim, confirmed that her husband regularly drove while intoxicated and used illicit drugs such as cocaine. She stated in her affidavit:

[Kim] knew his license was suspended and that his probation rules stated that he was not supposed to drink alcohol or to drive, but he knew that no one from the City of Fife was enforcing those conditions so he drank alcohol everyday that I observed him and he drove on a regular basis while he was on probation. Based on my conversations with [him] and knowledge from living with him, no one from the City of Fife monitored his probation and no probation officer ever came to the house to check on [him] or called the house to check on [him]. [He] never met with any probation officer during his probation with the City of Fife. [He] just continued to drink alcohol uncontrollably and drive until the accident on March 9, 2003.

CP at 2098-99. She also said that he never attended any of the required alcohol counseling classes or programs. And despite the probation requirement that his vehicles have an ignition interlock device, the record indicates that Kim caused these accidents while driving a new truck without such a device.

In *Joyce*, our Supreme Court rejected an argument similar to the City's about the need to show that a court would have imposed incarceration for violating probation conditions. *See* 155 Wn.2d at 321. The *Joyce* court held that evidence of proximate causation was sufficient where the estate of a motorist killed in an automobile crash sued DOC for negligent supervision of an offender who was driving the other vehicle. 155 Wn.2d at 309-10, 322-23. While on community supervision for an assault conviction, Stewart was arrested and charged with "first degree possession of stolen property, third degree driving with a suspended sentence, and failure to sign a notice of infraction." *Joyce*, 155 Wn.2d at 312. He had been admitted to psychiatric institutions and was using illicit drugs. He routinely violated the conditions of his release but his CCO waited

months before reporting them to the court. And considerable evidence showed that DOC knew of his violent tendencies. *Joyce*, 155 Wn.2d at 311-313. Eventually, Stewart's second CCO filed two violation notices recommending 20 days in jail. But roughly a week later, Stewart, while under the influence of marijuana, stole an outsized sport utility vehicle and struck the decedent's small truck, killing her. *Joyce*, 155 Wn.2d at 313-314.

The Benskins argue that the facts sufficient to show causation in *Joyce* are also present here, namely: (1) "a known history of drug abuse;" (2) "existing medical records explaining the risk;" (3) "a known history of relevant illegal behavior;" (4) "numerous unreported violations during probation;" and (5) "Stough's testimony that the offender would have been in jail if the violations were reported." Br. of Appellants at 16. Kim had five DUI offenses with 18 other convictions, many related to driving. The probation department also knew of Kim's long history of alcoholism dating back to a formal diagnosis in 1990. Kim was "being monitored . . . on an Antabuse Program." Antabuse is a drug "used as the last resort with severe alcoholic offenders" that causes violent illness if the taker consumes alcohol. CP at 171. In fact, the Benskins contend that

the causal chain is tighter here than in *Joyce*, in which expert Stough testified that the assailant would have been in jail prior to the accident if DOC had obtained a bench warrant. Here, the trial court ordered a bench warrant, but had to withdraw it because Fife Probation negligently failed to provide proper notice.

Br. of Appellants at 18 (emphasis omitted) (citation omitted).

The City attempts to distinguish *Joyce* by arguing that Stewart's prior violation was evidence of how a court would have ruled in the face of a parole violation. Although Stewart spent 39 days behind bars on prior probation violations, it appears that Fife's own behavior

prevented it from discovering Kim's repeated probation violations or knowing what a sentencing court would have ordered following a hearing. *Joyce*, 155 Wn.2d at 312. There was no hearing in this case, so evidence of how the court would have ruled does not exist; thus, the City's attempt to distinguish *Joyce* on this ground fails.

The *Joyce* court rejected the State's proximate cause argument that "even if it had properly monitored Stewart and reported violations to the court, it is unknown what action, if any, the court could have taken." 155 Wn.2d at 321. The court explained:

It is true that *if* the Department had properly supervised the offender and reported his violations, and *if* a judge had nonetheless decided to leave Stewart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop* [*v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999)]. Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had a severe alcohol problem, and that he had willfully '[driven] after his license had been suspended, the judge did not revoke probation.' 137 Wn.2d at 532. 'As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.' *Bishop*, 137 Wn.2d at 532. If the Department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the Department had unsuccessfully asked for judicial action, the causal chain would have been broken.^{9]}

Joyce, 155 Wn.2d at 321 (some alterations in original). The causal chain was not broken in *Joyce* and the State could not avoid the plaintiff's proximate cause showing or liability with that argument. 155 Wn.2d at 321-22. And, here, Hall's assessment supports the Benskins' contention that "[h]ad there been proper notification for the [Feb.]12[, 20]03 hearing it is more probable than not that Kim's sentence would have been revoked and Kim would have been locked up on [Mar.] 9[, 20]07." CP at 159.

⁹ Whether our Supreme Court meant to limit this language to factual cause, legal cause, or general proximate cause analysis is unclear. See *Bishop*, 155 Wn.2d at 321.

We hold that the question of proximate cause turns both on whether Kim would have been incarcerated and how the City's enforcement of the municipal court's release conditions would have affected the likelihood of Kim driving while impaired. Clearly, material issues of fact require a trial in this matter. "[T]he summary judgment procedure was not designed to deprive a litigant of a trial on disputed issues of fact." *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967).

We reverse the trial court's summary judgment order and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

I concur:

Penoyar, J.

Quinn-Brintnall, J. (concurring in the result) — Three days before the municipal court was to review Jong Hoon Kim’s compliance with his suspended sentence on his fifth driving while under the influence conviction, Kim, intoxicated, drove his pickup truck the wrong way on an on-ramp and crashed head-on with another car, killing Heather Benskin. It was Kim’s third collision that evening.

Although I concur with the result of the majority opinion, I write separately because I would agree with the trial court’s proximate cause determination if this were an issue of first impression here. First, I note that the pro tem municipal court’s decision to continue Kim’s probation review hearing rather than issue an arrest warrant arguably broke the causal chain to the City of Fife’s liability.¹⁰ The municipal court judge had a sufficient basis to issue an arrest warrant because the probation officer reported that Kim had not complied with the terms of his probation. Second, in my opinion Kim’s outrageous criminal conduct is the supervening, intervening cause of Benskin’s tragic death. *See Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 17 n.7, 810 P.2d 917, 817 P.2d 1359 (1991) (an intervening cause relieves a negligent party from liability and is defined as “a force that actively operates to produce harm to another after the actor’s act or omission has been committed”). Last, in my view, the City’s conduct does not amount to proximate cause as a matter of law because its failure to adequately supervise Kim, if proven, created only the possibility that Kim would be at the on-ramp on the fatal day and collide with Josh Mihok’s car. *See Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995).

But we are not addressing this issue for the first time. Our Supreme Court has repeatedly

¹⁰ The municipal court judge could not have issued a bench warrant for failure to appear because the City had not notified Kim of the hearing.

held that, however impossible it may be, government agencies are required to take charge of offenders and alleged offenders and stop them from committing future crimes and the issue of proximate cause is almost always a jury question. *See, e.g., Joyce v. State Dep't of Corr.*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005) (declining to overrule long-standing rule that the State has a duty to take reasonable precautions to protect community members from reasonably foreseeable dangers that a parolee poses); *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002) (it is a jury question whether State's negligent supervision proximately caused a parolee sex offender to abduct and rape his victim); *Bishop v. Miche*, 137 Wn.2d 518, 532, 973 P.2d 465 (1999) (County owed a duty to control driving under the influence probationer who failed to comply with court-ordered treatment, but proximate cause lacking under facts of case); *Taggart v. State*, 118 Wn.2d 195, 227-28, 822 P.2d 243 (1992) (it is a jury question whether failure of parole officials to respond to teletype from Montana authorities informing them that Montana police were standing by to arrest parolee was cause of injuries suffered by girl raped by parolee). Our Supreme Court has issued such rulings in numerous situations, including pre-trial supervision of persons presumed innocent¹¹ and, as here, supervision of those who have not yet completed their judicially imposed sentence. *See, e.g., Bishop*, 137 Wn.2d at 532. Bound by the

¹¹ *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999).

controlling precedent of this State's highest court, I concur with the majority that the trial court's summary judgment order here must be vacated and the matter remanded for trial.¹²

QUINN-BRINTNALL, J.

¹² I also note that, in 2007, the legislature enacted RCW 4.24.760, which provides:

A limited jurisdiction court that provides misdemeanor supervision services is not liable for civil damages based on the inadequate supervision or monitoring of a misdemeanor defendant or probationer unless the inadequate supervision or monitoring constitutes gross negligence.

RCW 4.24.760(1). This gross negligence standard applies to district and municipal courts and those acting at these courts' direction.